(3)

No. 87-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT CO., *et al.*
Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Williams Natural Gas Company (WNG) here respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitions for a writ of certiorari submitted in this case.

I.

INTEREST OF WILLIAMS NATURAL GAS COMPANY

The instant case involves the issue of whether Congress deregulated natural gas which is dually qualified under both regulated and deregulated Natural Gas

Policy Act (NGPA) categories. On this issue, WNG possesses a clear and direct interest.

In particular, WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Federal Energy Regulatory Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate customers.

Of the gas that WNG purchases under its approximately 1,100 contracts, substantial amounts of that gas dually qualifies under both regulated and deregulated categories. Indeed, as a result of the Tenth Circuit's decision at issue here, WNG, its customers and ultimate consumers will face substantially higher prices for this dually qualified gas. WNG estimates that these higher prices may cause over $100 million in additional costs for its past purchases and over $50 million in additional purchased gas costs for each future year.

II.

POSITION OF THE PARTIES

Pursuant to Supreme Court Rule 36.1, WNG contacted the active parties to the proceeding seeking their written consent. While WNG was able to obtain

the consent of the petitioners,[1] WNG was unable to obtain the written consent of a number of the parties who will likely oppose the petitions. Of these parties, Amoco Production Company expressly refused to give its written consent and others were at least initially noncomittal, thus necessitating the filing of this motion.

III.

WNG'S BRIEF AS *AMICUS CURIAE* SHOULD BE CONSIDERED BY THE COURT

As shown above, WNG has a clear interest in this matter in that it may face greater harm as a result of the Tenth Circuit's decision than any other interstate natural gas pipeline. Significantly, while the Tenth Circuit denied rehearing of its original order, the Court nonetheless recognized WNG's significant interest in this case by granting WNG's motion for leave to submit a brief as *amicus curiae* in support of the requests for rehearing of the court's March 9, 1987 decision in this case. Given this significant interest, WNG submits that it is necessary that it be allowed to submit the attached brief. Moreover, acceptance of this brief will help assure that the Court is fully apprised of all aspects of the important question presented.

WHEREFORE, WNG respectfully requests the Court to grant this motion and to accept and consider its attached brief as *Amicus Curiae* in support of the petitions in this case.

[1] The Federal Energy Regulatory Commission, Public Service Commission of the State of New York, Associated Gas Distributors, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company, and Tennessee Gas Pipeline Company.

Respectfully submitted,

WRIGHT & TALISMAN, P.C.

By______________________________

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BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Rule 19 and Rule 36 of the Rules of the Supreme Court of the United States, Williams Natural Gas Company (WNG) submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari filed by: (1) the Federal Energy Regulatory Commission (Commission) together with the Solicitor General of the United States; and (2) Public Service Commission of the State of New York, Associated Gas Distributors, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Tennessee Gas Pipeline Company. These petitions challenge a decision of the United States Court of Appeals for the Tenth Circuit (Commission's Petition, Appendix A) in *Martin Exploration Man-*

agement Co. v. FERC, Nos. 84-2756, *et al.* (10th Cir. March 9, 1987), reversing the Commission's finding in Order No. 406[1] that natural gas which is dually qualified for both a regulated and a deregulated category would be considered deregulated under the Natural Gas Policy Act (NGPA).[2] As demonstrated below, this Court should grant the petitions for a writ of certiorari because the Tenth Circuit committed clear legal error on an issue of first impression involving matters of great importance to natural gas companies and consumers.[3]

INTEREST OF WILLIAMS NATURAL GAS COMPANY

WNG possesses a clear and direct interest in this case. WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Federal Energy Regulatory Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate consumers.

WNG purchases substantial amounts of gas dually qualified under both deregulated (*e.g.*, NGPA §§102(c)

[1] FERC Stats. & Regs., ¶30,614 (1984) contained in Commission's Petition, Appendix E. (App. E).

[2] 15 U.S.C. § 3301-3432.

[3] Pursuant to Rule 36, WNG obtained the written consent of the active parties to file this brief.

and 103(c))[4] and regulated (*e.g.*, NGPA §107(c)(5))[5] NGPA categories. Under Order No. 406, WNG was able to reduce the price of much of its dually qualified gas to measurably lower market oriented prices. The Tenth Circuit in *Martin Exploration*, however, reversed Order No. 406 in part. That reversal, if upheld, will result in substantially higher prices for dually qualified gas. WNG estimates that such higher prices may cause WNG, its customers and the ultimate consumers increased costs totalling over $100 million for past purchases and over $50 million in additional purchased gas costs for each future year.

REASONS FOR GRANTING THE PETITIONS

Where a petition for a writ of certiorari involves an important question of federal law that has never been previously resolved, this Court should grant the petition and resolve the question. *See Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 125 S. Ct. 2587, 2612 n. 78 (1985). There can be no doubt that such is the case here. Indeed, the Commission's basic authority to implement Congressional desire for deregulation of certain categories of natural gas supplies is at issue and has been jeopardized by the Tenth Circuit's decision.

As shown below, the Tenth Circuit not only incorrectly decided this important question, but the lower

[4] 15 U.S.C. § 3312(c), covering "new" natural gas from new reservoirs, certain new OCS leases, or new wells drilled a certain distance from existing "marker" wells. 15 U.S.C. § 3313(c), covering "New onshore production wells."

[5] 15 U.S.C. § 3317(c)(5), covering gas that involved high cost production which the Commission found to present extraordinary risks or costs, and therefore provided higher ceiling prices.

court's decision will have a severe adverse impact on natural gas pipelines and consumers. Thus, this Court should grant the petitions.

A. The Tenth Circuit Incorrectly Interpreted The NGPA

1. The Tenth Circuit's decision was based on its conclusion that Section 121, 15 U.S.C. §3331, is unclear as to the issue in this case.[6] Contrary to the Tenth Circuit's interpretation, however, Section 121 is unambiguous on this point and shows that gas dually qualified in regulated and deregulated categories must be considered deregulated. In particular, Section 121 expressly states that:

> [T]he provisions of Part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985.

15 U.S.C. §3331.

Since the "provisions of Part A of this subchapter" refer to the various ceiling prices in Title I of the NGPA, this section deregulated specific categories of natural gas. These categories included new natural gas covered by NGPA Section 102(c) and new onshore production wells covered by NGPA Section 103(c), 15 U.S.C. §3313(c). Much of the dually qualified gas qualifies under these two deregulated categories. The only two enumerated exceptions to such deregulation involved subparts (d) and (e) of Section 121 which relate to certain Alaska natural gas and indefinite price escalators and are clearly not applicable to this case.

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[6] Commission's Petition, Appendix A at 11a.

Thus, the effect of the lower court's ruling is to add an additional exception to Section 121 for dually qualified gas. This was clear error because as a general principle of statutory construction, "the expression in a statute of certain powers, exceptions, designated persons or things, etc., implies the exclusion of others not mentioned." *Public Service Co. of Colorado v. FERC*, 754 F.2d 1555, 1567 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 849 (1986); *see also American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *Andrus v. Allard*, 444 U.S. 51, 56 (1979).

2. Furthermore, the legislative history of the NGPA evidences Congressional intent that dually qualified gas be deregulated effective as of January 1, 1985. For example, Senator Bartlett, in a discussion of the conference report, stated:

> [I]n informal discussions on the floor it has been asserted that stripper[7] wells are deregulated. This is true *only to the extent that such wells are otherwise new wells and would be deregulated anyway*. Their character as stripper wells, as shown under Section 121, does not get them deregulated in any way.

Cong. Rec. S. 15997 (September 25, 1978), 124 Cong. Rec. 31387 (1978) (emphasis added). Thus, Senator Bartlett agreed with the Commission that gas dually qualified in deregulated and regulated categories will be deregulated.

3. Finally, an analysis of NGPA Section 101(b)(5) demonstrates that the Tenth Circuit's interpretation

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[7] Stripper wells receive prices under NGPA Section 108 (15 U.S.C. § 3318).

is incorrect.[8] The court below concluded that Section 101(b)(5) unambiguously provides that the price of dually qualified gas would be the higher of the contract price or the regulated price.[9] That is, the producer is allowed to switch back and forth between the regulated and contract price and, is, in effect, guaranteed a minimum price for its gas.

Contrary to the lower court's holding, Section 101(b)(5) does not unambiguously allow producers to obtain the highest price for dually qualified gas where at least one qualifying category involves deregulated gas.[10] Indeed, the legislative history underlying Section 101(b)(5) shows clearly that Section 101(b)(5) applies only when two *regulated* categories are involved, not when gas qualifies under one regulated and one deregulated category.

Representative Dingell, the floor manager of the conference report in the House, together with Representatives Staggers, Ashley, Eckhardt and Wilson prepared "a comprehensive explanatory statement"

[8] 15 U.S.C. § 3311(b)(5), providing in full:

> (5) Sales qualifying under more than one provision. If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

[9] Commission's Petition, Appendix A at 13a-15a.

[10] Where a statutory provision is ambiguous, it is appropriate to employ legislative history, including statements by sponsors of the legislation, to resolve such ambiguity. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

subsequent to the filing of the conference report in the Senate, in order to answer "a number of questions [which] have arisen regarding the meaning of certain sections" and to "assist members of the House during their consideration." Cong. Rec. H. 13115 (October 14, 1978), 124 Cong. Rec. 38362 (1978). In pertinent part, this explanatory statement provided that:

> Questions have arisen regarding the meaning of Section 101(b)(5). *This rule is intended to facilitate resolution of which ceiling price may apply if more than one ceiling price rule appears applicable.* Whichever ceiling price could result in the highest price is the applicable maximum lawful price.

Cong. Rec. H. 13116 (October 14, 1978), 124 Cong. Rec. 38363 (1978) (emphasis added).

The explanatory statement, therefore, evidences Congressional intent that Section 101(b)(5) is only applicable where gas is subject to more than one regulated price because these Congressional statements refer to "ceiling price." The term "ceiling price" has no relevance to deregulated gas, for under the NGPA, ceiling price only pertains to regulated gas. *See* 15 U.S.C. §§3312-3319.

Therefore, the Tenth Circuit's decision was based on a clearly erroneous reading of the NGPA.

B. This Is Clearly A Matter Of Substantial Importance To Natural Gas Pipelines, Their Customers, And Millions Of Ultimate Natural Gas Consumers

There can be no doubt that the Tenth Circuit's action will result in the payment by natural gas pipelines of hundreds of millions of additional dollars for certain categories of natural gas. Most, if not all, of

these costs will in turn be borne by customers of natural gas pipelines who deliver natural gas to the ultimate consumer. The Commission (Petition at 22) estimated that the 1985-1987 cost of *Martin Exploration*, if upheld, will be approximately $300 million with costs continuing to mount thereafter. And, as discussed above, WNG estimates that the impact on WNG and its customers may be approximately $100 million for past periods and $50 million per year for subsequent years. Thus, the questions presented in this case are of considerable importance and the petitions must be granted.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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By ____________________

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